No. 89-1641

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NEWS/SUN SENTINEL COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

– and –

MIAMI TYPOGRAPHICAL UNION NO. 430.,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the NLRB require an employer to bargain with a union that bases its representation claim on a merger election which was rife with undisputed procedural defects, including the potential for uncontrolled duplicative voting, a failure to safeguard the ballot box, the absence of controls designed to ensure the veracity of the mail balloting and major discrepancies between the tally of ballots and the union's eligibility list?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner News/Sun Sentinel Company[1] ("Company") respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit entered on November 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a-8a)[2] is officially reported at 890 F.2d 430. The opinion of the National Labor Relations Board ("NLRB") (App. B, 10a) is officially reported at 290 N.L.R.B. No. 156 (September 21, 1988). The NLRB's Order denying the Company's motion for reconsideration is not officially reported and is reproduced in Appendix C (39a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit (9a) was entered on November 17, 1989. The order of the U.S. Court of Appeals for the District of Columbia Circuit denying the Company's petition for rehearing and suggestion for rehearing *en banc* was entered on January 16, 1990, and this petition is filed within 90 days from that date. (App. D, 41a). The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 151 *et seq.*, are reprinted as Appendix E hereto (42a).

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[1] Pursuant to Rule 28.1 of the Rules of this Court, Petitioner states that it is a subsidiary of the Tribune Company. Petitioner has no affiliates, and has one subsidiary, Gold Coast Publications.

[2] The pages of the Appendices to this petition are referred to as "(____a)."

STATEMENT OF THE CASE

For over thirty (30) years, the Company had a collective bargaining relationship with Fort Lauderdale Typographical Union Local No. 895 ("Local 895"), which represented the employees in the Company's composing room. The most recent collective bargaining agreement between the Company and Local 895 expired on June 30, 1984, and thereafter, despite thirty (30) negotiating sessions, the parties were unable to reach a successor agreement. (17a).

In October, 1985, officers of Local 895 requested that the International Typographical Union ("International") place the local in trusteeship, to obtain new leadership for the local and to facilitate a merger with Miami Typographical Union No. 430 ("Local 430"). The trusteeship and merger were expressly sought because Local 895's officers were "worn out" and no longer wished to serve. (17a-18a).

Following the imposition of the trusteeship, a merger election was held in December, 1985. The International sent mail ballots to the Local 895 members on its rolls. Non-members, and members who claimed not to have received a mail ballot, were permitted to vote on December 11, 1985, on the Company's composing room floor. (8a-19a, 22a-23a).

In the election, no controls were exercised to determine whether members who cast votes on the composing room floor also voted by mail ballot. (22a-23a). Further, there is no evidence that any controls at all were exercised over the mail balloting, to ensure that ballots were actually received and returned by eligible voters. (22a-23a).

Additionally, the union official responsible for the composing room balloting admitted that he left the ballot box in a separate room, unattended, for approximately 3 1/2 - 4 hours. (19a). When the ballots were counted, the tally of ballots did not conform to the eligibility list, in that the ballot box contained more ballots than the union's eligibility list indicated had been distributed and cast. (22a-23a).

Subsequently, by letter dated December 17, 1985, Local 430 informed the Company that its employees had voted in favor of the merger by a vote of 115 to 32. Local 430's letter further requested that the Company commence bargaining with it. (19a).

Based, among other things, on the procedural irregularities in the merger election, the Company refused Local 430's request for recognition. Local 430 then filed unfair labor practice charges with Region 12 of the NLRB, alleging that the Company's refusal to bargain violated Sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (5). (2a).

Initially, the NLRB's Regional Director dismissed Local 430's charges because of the procedural deficiencies in the merger election which were uncovered by his investigation. The Regional Director's factual findings, to which the NLRB has stipulated, were as follows:

> On December 11, 1985, unit employees, among others, voted to determine whether or not they wanted their collective bargaining representative, Typographical Union Local No. 895 to merge with Miami Typographical Union No. 430, AFL-CIO. Some of the eligible voters (including retirees) received mail ballots directly from the International Union Headquarters in Colorado and other employees voted personally in the December 11 election. The Charging Party maintains the employees, by a vote of 115 to 32, voted in favor of merger and thus it requested the Employer to bargain with Local 430. By letter dated January 27, 1985, the Employer refused the Union's request, stating it did not believe Local 430 legally represented the unit (composing room) employees. The investigation revealed several improprieties in the voting procedure, and although no employee made a specific complaint concerning the conduct of the election, some employees did testify with respect to those improprieties. For example, the eligibility list used by

> the Union reveals that 40 composing room employees were given ballots and 36 returned them and placed them in the ballot box. However, the tally of ballots for the composing room shows 41 for merger and 3 against. Further, by the union official's admission, there is no way of knowing if employees in the composing room who voted in person also received a mail ballot from the Union's Headquarters in Colorado, thereby creating the possibility of permitting one voter to cast two ballots. One employee testified he was given a ballot by the union official holding the election and that he placed his ballot in the box, but according to the eligibility list he did not personally cast a ballot but rather he received a mail ballot from the International Union. Further, one employee stated that she chose not to vote, and therefore did not cast a ballot, but the eligibility list indicates that the employee was given a ballot and did vote. In addition, the ballot box with only a piece of tape over the opening was left in the Employer's maintenance room unattended from approximately 3:50 p.m. to 7 or 8 p.m. on the day the voting took place. Under these circumstances, it is concluded that irregularities in the voting procedure preclude conferral of representative status upon Local 430 on the basis of the December 11 election and that, therefore, the Employer did not violate the Act by refusing to recognize and bargain with the Charging Party.

(22a-23a).

Thereafter, Local 430 appealed the Regional Director's dismissal of its charges to the NLRB's Office of Appeals, which reinstated the charges and directed the Regional Director to issue a complaint. (2a). Following a hearing, an NLRB Administrative Law Judge ("ALJ") concluded that the Company had unlawfully refused to bargain with Local 430. (2a). The NLRB affirmed the ALJ's decision and, on appeal, the NLRB's order was enforced by the U.S. Court of Appeals for the District of Columbia Circuit. (2a, 9a). The D.C. Circuit's jurisdiction was based on Section 10(f) of the NLRA, 29 U.S.C. § 160(f).

REASON FOR GRANTING THE WRIT:

THIS CASE RAISES A SIGNIFICANT QUESTION, WHICH SHOULD BE SETTLED BY THIS COURT, CONCERNING THE EXTENT TO WHICH UNION MERGER ELECTIONS MUST COMPORT WITH PRINCIPLES OF DUE PROCESS

In assessing the adequacy of union merger elections, the NLRB has traditionally required that such elections be conducted in accordance with recognized principles of due process; that is, employees must have notice of the election and an opportunity to discuss it, and precautions must be taken to safeguard the secrecy of the ballot. *E.g., Quality Inn Waikiki*, 297 N.L.R.B. No. 71, slip op. at 9 (December 29, 1989). The purpose of these requirements is to ensure that "the declared result of the voting truly reflects the majority will." *State Bank of India*, 262 N.L.R.B. 1108, 1116 (1982). Thus, where defects in the voting process have raised questions concerning the integrity of the balloting, the NLRB has declined to recognize the election result. *See, e.g., J.H. Day Company*, 204 N.L.R.B. 863 (1973); *North Electric Company*, 165 N.L.R.B. 942 (1967).

In *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192 (1986) ("*Seattle-First*"), this Court recognized, but expressly did not pass upon, these traditional due process requirements, stating:

> The union suggests that it may even be inappropriate for the Board to impose due process standards with respect to union members. Brief for FIEA 28-29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not address the propriety of the Board's past procedures.

Seattle First, 475 U.S. at 198, n.6.

In the instant case, it is clear that the NLRB's traditional due process requirements were not satisfied. One cannot conclude

that "adequate precautions" were taken to ensure the secrecy of the ballot where, as here, the ballot box was left unattended between voting sessions for 3-1/2 to 4 hours. (19a). Moreover, the discrepancies between the union's eligibility list and its tally of ballots raise substantial questions concerning the integrity of the balloting, as does the total lack of safeguards to prevent duplicative voting. (22a-23a).

In *J.H. Day Company*, 204 N.L.R.B. 863 (1973), for example, similar election irregularities caused the NLRB to invalidate an affiliation vote. In that case, the NLRB noted:

> (1) there was no way to determine if certain employees voted more than once;
>
> (2) it was not clear what happened to the ballot container between the first and second voting sessions;
>
> (3) beer was consumed during the voting process; and
>
> (4) some of the ballots had no legend on the top, but contained only "yes" and "no" boxes.

Cf. Bear Archery, Division of Victor Comptometer Corp., 223 N.L.R.B. 1169 (1976), *enf. denied on other grounds*, 587 F.2d 812 (6th Cir. 1977) [affiliation election satisfied due process requirements where, *inter alia*, "[t]he ballot box was never removed from the table and was guarded at all times by either the Association's secretary or treasurer."]

Moreover, the NLRB has long viewed mail balloting with suspicion, because of the inherent potential for abuse in this type of unsupervised voting. *See, e.g., Mission Industries*, 283 N.L.R.B. 1027 (1987); *Brink's Armored Car*, 278 N.L.R.B. 141 (1986). Thus, where mail balloting is used, the NLRB requires that specified procedures be followed, including the requirement that voters sign their names on the ballot envelopes so that their eligibility can be verified. *E.g., Thompson Roofing, Inc.*, 291 N.L.R.B. No. 108, slip op. at 1, n.1 (November 16, 1988).

These procedures have been held warranted in an affiliation election. For example, in *East Dayton Tool & Die Company*, 190 N.L.R.B. 577 (1971), the NLRB recognized the results of an affiliation election because there was "affirmative evidence" that the ballots were "in fact opened and counted in a manner which both affirmed the eligibility of the voter and preserved the secrecy of his vote." *Id.* at 579. The affirmative evidence relied on in that case consisted of a dual envelope procedure designed to ensure that the only mail ballots counted were those returned by eligible voters. *Id.* at 578.

In the instant election, by contrast, there were no procedures used to ensure that only eligible voters cast mail ballots. Moreover, as noted, the conceded irregularities in the composing room voting included a lengthy failure to safeguard the ballot box, the possibility of uncontrolled duplicative voting, and unexplained discrepancies between the union's tally of ballots and its eligibility list. Indeed, the D.C. Circuit itself recognized that this merger election was certainly "*not* a textbook example of meticulousness." (6a; emphasis added).

Nonetheless, relying on *Seattle-First*, the D.C. Circuit concluded that these procedural flaws were insufficient to warrant overturning the election. (6a). Further, the D.C. Circuit rejected the Company's contention that the election's procedural deficiencies required shifting the burden of proving procedural propriety to the NLRB General Counsel. (5a-6a and note 4). *See Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 54 (2d Cir. 1988).

Under the factual circumstances of this case, the D.C. Circuit's conclusions on this critical due process issue cannot be allowed to stand unexamined. The Court's decision effectively abrogates the traditional due process requirements, by declining to apply them in an obviously appropriate setting. Simply put, to conclude that due process was not violated in this case is tantamount to concluding that due process is not required — a result which surely was not intended by this Court. Accordingly, this Court should review the D.C. Circuit's decision to resolve whether a union should be entitled to representation rights based on a procedurally defective election like the one in this case.

CONCLUSION

Based on all of the foregoing, the Company's petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the District of Columbia Circuit should be granted.

Dated: April 16, 1990

Respectfully submitted,

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APPENDIX

NEWS/SUN SENTINEL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

Miami Typographical Union No. 430, Intervenor.

No. 88—1815.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 19, 1989.

Decided Nov. 17, 1989.

Petition for Review of an Order of the National Labor Relations Board.

Bonnie Glatzer, New York City, for petitioner. Ronald A. Lindsay, Washington, D.C., also entered an appearance for petitioner.

Joseph H. Bornong, Attorney, N.L.R.B., with whom Paul J. Spielberg, Deputy Asst. General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, N.L.R.B., Washington, D.C., were on the brief for respondent.

Richard Rosenblatt for intervenor.

Before: WALD, Chief Judge, RUTH B. GINSBURG, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by
Circuit Judge RUTH B. GINSBURG.

RUTH BADER GINSBURG, Circuit Judge:

This refusal-to-bargain case arose out of a merger between two locals of the International Typographical Union (ITU). In late 1985, the composing room employees of the News/Sun Sentinel Company (the Company) elected by a vote of 115 to 32 to merge the collective bargaining unit that had represented them for over 30 years, Local 895, into Local 430, after negotiations for a new agreement with the Company had reached an

impasse.[1] The Company denied Local 430's subsequent request for bargaining, contending that Local 430 did not truly represent the composing room employees. Following the election and the refusal to bargain, a Company employee filed a petition to decertify Local 430. Local 430 lodged unfair labor practice charges with the National Labor Relations Board (NLRB or Board); the charges were initially rejected but were sustained on appeal. The NLRB's Regional Director then issued a complaint charging that the Company had violated the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1) and (5), by its refusal to bargain.[2]

After a hearing, an Administrative Law Judge (ALJ) concluded that Local 430 was entitled to succeed to Local 895's collective bargaining status and that the Company's refusal to bargain constituted an unfair labor practice; the ALJ therefore ordered the Company to bargain with Local 430. *News/Sun-Sentinel Co.*, No. 12-CA-11916, Memorandum Decision (Mar. 11, 1988) (ALJ Decision). The NLRB affirmed the ALJ's decision. *News/Sun-Sentinel Co.*, 290 N.L.R.B. No. 156 (Sept. 21, 1988). The Company petitioned the NLRB to reconsider its ruling or remand the case, contending that in light of the decertification petition, Local 430 should not be accorded representation rights absent a Board-conducted election. The NLRB denied the Company's request. *News/Sun-Sentinel Co.*, No. 12-CA-11916, Order Denying Motion (Nov. 17, 1988). The Company then petitioned this court for review of the bargaining order and the order

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[1] Two months before the merger election, Local 895 asked the ITU to appoint a trustee to take over the day-to-day operation of the unit, due to the local's difficulty in attracting new leadership. Local 895's officers remained at their posts in an acting capacity to asist the ITU-appointed trustee.

[2] The NLRA provides in pertinent part:

> It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [the Act];
> . . . .
> (5) to refuse to bargain collectively with the representatives of his employees. . . .

29 U.S.C. § 158(a).

denying reconsideration; the NLRB cross-applied for enforcement of the bargaining order. Local 430 intervened in the dispute in support of both NLRB orders. We deny the Company's petition and grant the Board's application.

I. Contours of the Controversy

Traditionally, the NLRB has used two criteria to determine whether organizational changes such as mergers and affiliations affect the collective bargaining status of unions:

> [The first] is a test for "continuity of representation," by which the Board seeks to determine whether replacement by the successor union disrupts the bargaining relationship established by its predecessor. Second, the Board requires . . . that the election procedure be conducted in accordance with minimal standards of "due process," so that the outcome accurately reflects the employees' true desires.

Note, *Union Affiliations and Collective Bargaining*, 128 U.Pa.L.Rev. 430, 433 (1979). When these standards are not met, the Board will invalidate the union election and will itself supervise a new election.[3] The Company contends that the Board erred in finding that both the continuity and the due process standards were met in this case. The intervening union, while endorsing the NLRB's findings, challenges the Board's authority to invalidate a merger election on due process grounds.

II. Continuity of Representation

[1] The Supreme Court has stated that "'[t]he industrial stability sought by the [NLRA] would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship.'" *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192, 202-03, 106 S.Ct. 1007, 1012-13, 89 L.Ed.2d 151 (1986) (*Seattle-First*) (quoting *Canton Sign Co.*, 174 N.L.R.B. 906, 909 (1969)). The Company, as the party seeking such displacement, has the

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[3] The Board must administer an election whenever it finds that a "question of representation" exists that affects the status of a certified union. *See* 29 U.S.C. § 159(c).

burden of proving its claim of discontinuity. *See Insulfab Plastics, Inc.*, 274 N.L.R.B. 817, 821 (1985) *enforced sub nom. NLRB v. Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir.1986). The Board's findings of fact regarding changes resulting from union reorganizations are conclusive if supported by substantial evidence on the record as a whole. *See Insulfab Plastics*, 789 F.2d at 966.

[2] The Company contends that the Board erred in adopting the ALJ's finding of continuity between Locals 895 and 430. The Company first argues that Local 895 was defunct at the time of the merger, and therefore was incapable of shifting its representational rights to another local. However, "[a] bargaining representative is considered defunct . . . only if it is unable or unwilling to represent the employees." *Yates Indus., Inc.*, 264 N.L.R.B. 1237, 1249 (1982). Here, substantial evidence supported the determination that "the Union sought the trusteeship and the merger in order to bring fresh leadership to the Union and to eliminate the impasse in contractual negotiations and work for a new contract." ALJ Decision at 12. Furthermore, the Company failed to question the vitality of Local 895 until after the merger election; the delay in asserting defunctness substantially weakens the plea.

[3] The Company has similarly failed to sustain its burden of proving discontinuity of representation. In assessing continuity, the NLRB does not run down a checklist of "certain cited criteria"; instead, the Board considers "the totality of the situation." *Yates Indus.*, 264 N.L.R.B. at 1250. Continuity is evidenced by the maintenance of traces of preexisting identity and the retention of autonomy over the day-to-day administration of bargaining agreements. Accordingly, a question concerning representation has been found to exist when "[a] change would result in the complete loss of the identity of the certified union and in the substitution of a new and different union as representative of the employees in the certified unit." *The Gas Serv. Co.*, 213 N.L.R.B. 932, 933 (1974); *see also Gulf Oil Corp.*, 135 N.L.R.B. 184 (1962).

[4] No such loss of identity occurred here. In contrast, as counsel for the Company conceded at oral argument, the

structure of the "chapel," or collective bargaining unit, composed of Company employees remained essentially unchanged after the merger. Of principal importance, the chapel retained primary responsibility for processing grievances, administering collective bargaining agreements, and ratifying contracts with the Company.

[5] The Company contends that because the local has veto power over contracts ratified by the chapel, and because the former membership of Local 895 comprises only half the membership of Local 430, the merger impermissibly curtailed the employees' autonomy. Contrary to the Company's suggestion, however, a question concerning representation is not automatically generated whenever a relatively small group merges into a larger one. If, as in this case, sufficient indicia of continuing autonomy are present, numerical disparities in voting strength will not force a finding of discontinuity. *See Montgomery Ward & Co.*, 188 N.L.R.B. 551, 552 (1971) (holding that merger of 500-member local into 11,000-member sister local did not alter essential identity of bargaining representative). Furthermore, before the merger, contracts between the Company and Local 895 were already subject to veto by the ITU, *see* Constitution, Bylaws, General Laws and Convention Laws of the International Typographical Union, Art. VII, §§ 3-4 (1984); the merger, therefore, did not drastically reduce the actual autonomy of the Company's employees. In short, the Board was justified in finding that any administrative or organizational changes resulting from the merger were not "sufficiently dramatic to alter the union's identity." *Seattle-First*, 475 U.S. at 206, 106 S.Ct. at 1015.

III. Due Process

[6] The Company next contends that procedural irregularities in the merger election violated minimum standards of due process. The record does not bear out this assertion. An announcement on the composing room bulletin board and two Local 895 meetings afforded the Company's employees adequate notice of the election and an opportunity to comment on it. As to the voting itself, union members were able to vote by mail; the

record does not suggest that the mail-in vote, which totaled 74-29 in favor of the merger, was tainted.[4] Although the mail-in balloting did not conform to the standards adhered to in NLRB-conducted elections, those standards do not govern here. *See Seattle-First*, 475 U.S. at 204, 106 S.Ct. at 1013 ("While the Board is charged with responsibility to administer [its own statutory election] procedure, the [NLRA] gives the Board no authority to require unions to follow other procedures in adopting organizational changes."); *East Dayton Tool & Die Co.*, 190 N.L.R.B. 577, 579 (1971). Absent any evidence of irregularity, the mail-in balloting is a reliable indicator of majority sentiment.

[7] The Company's main challenges are directed at the conduct of the composing room balloting, which resulted in a vote of 41-3 in favor of the merger. The Company contends that the union failed to ensure that employees who voted in the composing room did not also vote by mail. Absent an affirmative showing of irregularity by the Company, however, the merger election must stand undisturbed. *See supra* note 4. The record contains evidence of only two instances in which votes were actually cast by employees in a manner different from the union's own accounts; this does not suffice to undermine the composing room election results.

The Company further asserts, as a reason to invalidate the election, the failure of union officials fully to secure the ballot box. Again, although NLRB election procedures require the ballot box to be tended at all times, federal labor law does not impose such precautions on internal union elections. *See Seattle-First*, 475 U.S. at 204, 106 S.Ct. at 1013. Although not a textbook example of meticulousness, the voting procedures followed in the composing room were not so lacking in safeguards as to cast substantial doubt on the election outcome. *Cf. The J.H. Day Co.*, 204 N.L.R.B. 863, 864 (1973) (invalidating election that

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[4] Contrary to the Company's suggestion, an employer challenging the validity of a merger election must provide an evidentiary showing of irregularity before the burden can shift to the NLRB General Counsel to provide affirmative proof of procedural propriety. *See Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 54 (2d Cir. 1988).

approved affiliation by a 17-vote margin when "56 of the 134 ballots cast had no legend at the top, but contained only 'YES' and 'NO' boxes"). In sum, the Board properly concluded that "the election procedures [were] not . . . so 'lax' or 'substantially irregular' as to 'negate the validity of the election.'" *NLRB v. Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir.1975).[5]

IV. Decertification Petition

[8] Finally, the Company contends that the board erred in failing to consider the decertification petition filed by a Company employee as evidence of employee dissatisfaction with the merger election. However, the decertification petition was not filed until two months after the disputed election. There is no indication that the petition stemmed from dissatisfaction with the election, and no further evidence of dissatisfaction in the record; nor does the record indicate how many employees joined in the petition.[6] The Company's refusal to bargain, moreover, intervened between the election and the petition, and thus could have influenced employee attitudes towards the union. *See Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704, 64 S.Ct. 817, 818, 88 L.Ed. 1020 (1944) (unfair labor practices may discourage

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[5] The union asserts that the NLRB lacked authority even to engage in a due process inquiry. In *Seattle-First*, the Supreme Court held that the NLRB had exceeded its authority under the NLRA in invalidating an affiliation election solely because the union had not permitted non-member employees to vote. The Court declined to address the union's further contention that "it may even be inappropriate for the Board to impose due process safeguards with respect to union members." *Seattle-First*, 475 U.S. at 199 n.6, 106 S.Ct. at 1011 n.6. Because the NLRB did not invalidate the merger election here on due process grounds, and because the Board's findings as to due process are supported by the record, we save for another day and case the question left open by *Seattle-First*.

[6] Even if, as the Company urges, the fact that the Board did not dismiss the petition suggests that it was supported by the requisite 30% showing of interest, *see* 29 U.S.C. § 159(e)(1), the petition would not warrant overturning the election results. *Cf. Allied Indus. Workers, Local 289 v. NLRB*, 476 F.2d 868, 881 (D.C.Cir.1973) ("The naked showing that a decertification petition has been filed, with no indication of the number of signatories . . ., is an insufficient basis in fact for refusing to bargain . . .").

union membership). Absent further evidence of employee dissatisfaction associated with the merger election and separable from the effects of the Company's refusal to bargain, it was appropriate for the Board to disregard the decertification petition when assessing the effect of the merger on the union's collective bargaining status. *See NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 433 (1st Cir.1985), *aff'd*, 482 U.S. 27, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987) (upholding ALJ's refusal to consider at unfair labor practice hearing decertification petitions filed after refusal to bargain because "no useful purpose is served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal").

[9] Finally, the Board properly ordered bargaining rather than a new election, given twin factors: (1) cause to doubt whether the petition accurately reflected employee dissatisfaction with the merger; and (2) the continuing hazard that the Company's refusal to bargain might influence the outcome of a second election. *Cf. St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147 (D.C.Cir.1989) (remanding bargaining order for examination of effect of employer's unfair labor practices on decertification election where decertification petition preceded unfair practices); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 50 (D.C.Cir.1908) (ordering election rather than bargaining where loss of support for union had been clearly demonstrated in an election free from unfair labor practices).

The NLRB's finding that Local 430 was entitled to succeed to the collective bargaining rights of Local 895 was supported by substantial evidence. The Company's petition for review is therefore denied, and the NLRB's motion to enforce its bargaining order is granted.

It is so ordered.

United States Court of Appeals

FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

No. 88-1815 **September Term, 1989**

News/Sun Sentinel Company,

Petitioner

v.

National Labor Relations Board,

Respondent

PETITION FOR REVIEW AND CROSS-APPLICATION OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Wald, Chief Judge, Ruth B. Ginsburg and D.H. Ginsburg, Circuit Judges

JUDGMENT

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is denied and the cross-application for enforcement is granted, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre/wj

CONSTANCE L. DUPRE, CLERK

Date: 11-17-89
Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg

SJC

D–9114
290 NLRB No. 156 Ft. Lauderdale, FL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWS/SUN-SENTINEL COMPANY

and

MIAMI TYPOGRAPHICAL UNION NO. 430 a/w INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO

Case 12-CA-11916

DECISION AND ORDER

On March 11, 1988, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting and answering briefs, and the Respondent filed a brief in opposition to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

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[1] The General Counsel excepts to the judge's description of a stipulation entered into by the Respondent and the General Counsel as consisting of facts and conclusions contained in the Regional Director's original dismissal of charges. The General Counsel stipulated only to the facts contained in the Regional Director's dismissal letter, not to the conclusions reached by the Regional Director. This error does not affect the judge's conclusions.

In sec. IV, A, 1, par. 4, the judge refers to employee Norma Scheer. The reference should be to Irene Scherer. The judge finds that the tally of ballots from the ballot box in the composing room was 41 for merger, 13 against merger; the correct tally was 41 for merger, 3 against. We correct these errors, which do not affect the judge's conclusions.

In adopting the judge's finding that the merger between Local 895 and Local 430 was valid, we find it unnecessary to rely on the judge's discussion of the Respondent's January 28, 1986 speech to employees and the subsequent decertification petition filed by an employee on February 11, 1986.

We agree with the judge's finding that there was substantial continuity of representative between premerger Local 895 and postmerger Local 430. The change effected here by the merger of Local 895 with Local 430 is unlike the change at issue in *Western Commercial Transport*, 288 NLRB No. 27 (Mar. 25, 1988), in which a small, completely autonomous independent union was replaced by an 8500-member organization, one of whose business agents essentially assumed control of collective bargaining and day-to-day contract administration for the unit employees. As the judge found here, some of Local 895's officers became officers in postmerger Local 430 and the chapel's own authority over collective bargaining and contract administration matters remained substantially unaltered by the merger of the Locals. The change was not "'*sufficiently dramatic* to alter the union's identity'" so as to raise a question concerning representation. See *May Department Stores Co.*, 289 NLRB No. 88 (June 30, 1988), slip op. at 14, citing *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192, 206 (1986). We do not rely on *Quemetco, Inc.*, 226 NLRB 1398 (1976), which *Western Commercial Transport* overruled to the extent that it held that an amendment of certification may be granted notwithstanding evidence showing the absence of continuity of representation.

Member Johansen agrees with his colleagues, for reasons stated by him in his dissent in *Western Commercial Transport*, 288 NLRB No. 27 (Mar. 25, 1988), that the merger in this case did not give rise to a question concerning representation.

[2] Although the judge correctly described the unit in the body of his decision, he misdescribed the unit in his recommended Order and notice. We shall conform the recommended Order and notice with the judge's findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, News/Sun-Sentinel Company, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

> "(a) Refusing to recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive bargaining unit representative of employees employed by the Respondent performing composing room work at its Fort Lauderdale, Florida newspaper in Broward County, Florida."

2. Substitute the following for paragraph 2(a).

> "(a) Recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive collective-bargaining representative of employees employed by the Respondent performing composing room work at its Fort Lauderdale, Florida newspaper in Broward County, Florida, exclusive of office clerical employees, professional employees, and supervisors as defined in the Act."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 21, 1988

James M. Stephens,	Chairman
Wilford W. Johansen,	Member
Mary Miller Cracraft,	Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive representative of the unit employees described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL–CIO, as the exclusive collective-bargaining representative of employees performing composing room work at our Fort Lauderdale, Florida newspaper facility, exclusive of office clerical employees, professional employees, and supervisors as defined in the Act.

NEWS/SUN-SENTINEL COMPANY

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 700 Twiggs Street, Suite 511, P.O. Box 172068, Tampa, Florida 33601-0068, Telephone 813 – 228-2662.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NEWS/SUN-SENTINEL COMPANY

and

CASE
12-CA-11916

MIAMI TYPOGRAPHICAL UNION
NO. 430 a/w INTERNATIONAL
TYPOGRAPHICAL UNION, AFL-CIO

Andreas Rivera-Ortiz, Esq.,
for the General Counsel.
Richard Rosenblatt, Esq.,
Colorado Springs, CO,
for the Charging Party.
Bonnie A. Glatzer, Esq.
(Seyfarth, Shaw, Fairweather,
& Geraldson), New York, NY,
and **Dennis R. Homerin, Esq.,**
Chicago, IL, for Respondent.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 15 and 16 June 1987 at Miami, Florida, pursuant to a complaint filed by the Regional Director for Region 12 of the National Labor Relations Board ("the Board") against News/Sun-Sentinel Company ("the Respondent" or "the Employer" or "the Sun/Sentinel"). The complaint, as amended at the hearing, is based on an unfair labor practice charge filed on 18 February 1986 by Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO ("Local 430" or "the Charging Party") and alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act") by the withdrawal of recognition from the Charging Party and by failing and refusing to bargain with the

Charging Party. The complaint is joined by Respondent's answer wherein Respondent denies the commission of any violations of the Act.

Upon the entire record in this case, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by Counsel for General Counsel, the Charging Party, and Respondent, I make the following:

Findings of Fact and Analysis [1]

I. Business of the Respondent

Respondent, a Delaware corporation, with an office and principal place of business in Fort Lauderdale, Florida has been engaged in the publication, circulation, and distribution of a daily newspaper in Broward County, Florida. During the past 12 months, a representative period of time, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and during the same period of time purchased and received at its Fort Lauderdale, Florida facility, goods and materials valued in excess of $50,000 which were shipped to it directly from points located outside the State of Florida. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Union

The complaint alleges, Respondent denies, and I find, that Local 430 is a labor organization within the meaning of Section 2(5) of the Act. This finding is made on the basis of unrebutted testimony presented by the General Counsel and Charging Party through the testimony of International Typographical Union Representative Wimbley Waters[2] and Local 430's

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[1] The following includes a composite of the testimony of the witnesses, which testimony is credited except as specific credibility resolutions are made.

[2] Waters is also president of Daytona Beach, Florida Local 892 affiliated with the International Typographical Union.

secretary-treasurer Irwin Radin concerning the functions of former Local 895 and pre and post-merger Local 430 and their representation of employees in their relationship with employers concerning wages, hours, and other terms and conditions of employment.

III. The Appropriate Bargaining Unit

The complaint, as amended at the hearing, alleges, Respondent admits, and I find, that the appropriate bargaining unit is as follows:

> All full-time and regular part-time employees employed by Respondent performing composing room work, excluding all office clerical employees, guards and supervisors as defined in the Act.

IV. The Alleged Unfair Labor Practices [3]

Fort Lauderdale Typographical Union Local No. 895 ("Local 895) had a collective bargaining relationship with Respondent over a period of more than 30 years and the parties had entered into successive labor agreements throughout that period, the most recent of which expired on 30 June 1984. Local 895 and Respondent had held 30 bargaining sessions to negotiate a successor to the agreement which expired in 1984 until impasse was reached in March 1985. On 10 March, Respondent imposed its final bargaining proposal following the impasse after these unsuccessful contract negotiations. The parties next met to negotiate a contract in April 1985 and did not thereafter meet to negotiate a contract until December 1985. In the interim, officers of Local 895 met with International Representative Wimbley Waters in October 1985 and asked that a trusteeship be imposed on Local 895 in order that contract negotiations could be commenced again with Respondent and to obtain new leadership for Local 895 and also to facilitate a merger of Local 895 with Local 430 according to the unrebutted testimony of Local 895's former secretary-treasurer Walter Sakowski who is now a retired member of Local 895. Sakowski testified that Local

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[3] The General Counsel's unopposed Motion to Correct the Record is granted and the record is hereby amended as shown on "Appendix A".

895 officers were worn out and the trusteeship and merger of Local 895 with Local 430 were also sought for the purpose of obtaining new leadership. According to the unrebutted testimony of Sakowski and Local 430's secretary-treasurer Irwin Radin, the two local unions had also discussed merger in 1983. With the approval of the International Union, the trusteeship was imposed on Local 895 on 9 October 1985 with Wimbley Waters, president of the Daytona local and a part-time international representative, appointed trustee of Local 895 at which time Waters asked all of the officers of Local 895 and members of its negotiating committee to remain in their offices which they did. Within the various locals of the International Union, there are "chapels" which are local committees at particular employers which form the local. There was such a chapel at the Sun/Sentinel which had its own dues and maintained its own funds apart and distinct from the local and which handled grievances in the early stages and which presented contract proposals for consideration by the Local in preparation for negotiations with Respondent. The chapel chairman served in the role of a chief steward for the chapel members.

On 6 December 1985, Respondent and Local 895 met to engage in negotiations and, at that time, Waters informed Respondent's Vice President and Director of Employee Relations John T. Spran that he was the trustee of Local 895 and requested and received permission to conduct a merger vote on Respondent's premises on 11 December 1985. The International sent mail ballots to members of Local 895 and Local 895 posted a notice of the merger vote* in the composing room of Respondent. The merger was discussed at meetings of Local 895 on 3 November and 8 December 1985. The mail vote of members of Local 895 yielded a tally of 74 in favor of the merger and 29 opposed to the merger. In addition, nonunion members of

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* The notice read as follows:

NOTICE OF ELECTION
REFERENDUM VOTE FOR MERGER BETWEEN
MIAMI TYPOGRAPHICAL UNION No. 430
and
Fort Lauderdale Typographical Union No. 895

(Footnote continued)

the bargaining unit were given ballots and permitted to vote in the composing room on 11 December by placing a ballot in a padlocked box kept by Local 895's secretary-treasurer Sakowski at his work place during the first day shift but left unattended for a period of 3½ to 4 hours when Sakowski left work and before he returned to collect the ballots after the first shift. One nonunion member employee testified that she gave her ballot to Sakowski to place in the box and assumed that he had done so. She testified she trusted Sakowski completely. Sakowski did not recall the incident. I credit the employee's testimony that she gave her ballot to Sakowski. The tally of the job site balloting of nonunion members of the bargaining unit of Local 895 was 41 in favor of the merger and 13 opposed to the merger. The total tally of the vote by Local 895 was 115 in favor and 32 opposed to the merger. The tally of Local 430's votes on the merger was 79 in favor and 10 opposed to the merger.

Waters informed Respondent by his letter of 17 December 1985 to John T. Spran, Respondent's vice president and employee relations director, that the employees in the bargaining unit had voted in favor of merging with Local 430 by a vote of 115 in favor of the merger and 32 opposed to the merger. In this letter, Waters also requested a meeting to negotiate a new agreement. Waters testified that between 17 December and 27 January 1986 when Respondent sent a letter to him withdrawing recognition from Local 430, that he had telephone discussions with Spran and Debbie Dodds, a member of Respondent's negotiating committee in attempting to set up meeting dates to resume negotiations. During one of these telephone conversations, Waters talked to Spran and asked whether Spran had received the 17 December 1985 letter and whether he had any problems with it. Spran replied that he had received the letter and told Waters that he had no problems with it. Spran told Waters he would send the letter to San Francisco and would have Dodds place Local 430 on the calendar. On 27 January 1986, Spran sent Waters a letter withdrawing recognition as follows:

The agreement would merge Fort Lauderdale Typographical Union No. 895 into Miami Typographical Union No. 430.

The election date is Wednesday December 11, 1985 – Mail Ballots must be post marked by midnight Wednesday December 11, 1985 – Chapel voting must be completed by Midnight Wednesday, December 11, 1985.

January 27, 1986

Mr. Wimbely Waters
I.T.U. Appointed Trustee
Ft. Lauderdale Typographical Union
Local #895
P.O. Box 84
Ft. Lauderdale, FL 33302

Dear Mr. Waters:

We are in receipt of your letter dated December 17, 1985. We understand from your letter that as of January 1, 1986, Fort Lauderdale Typographical Union #895 no longer exists and will no longer represent Composing Room employees of the News/Sun-Sentinel Company.

We do not believe that Miami Typographical Union #430 legally represents the Composing Room employees of News/Sun-Sentinel Company, and, as a consequence, we refuse to recognize and bargain with Local #430 as a representative of those employees.

JTS/dd

/s/ John T. Spran

On 28 January 1986, Respondent's President T. O'Donnell delivered a speech to the composing room employees wherein he stated as follows:

> On December 17, 1985 we received the following letter from Wimberly (sic) Waters, I.T.U. Appointed Trustee for Fort Lauderdale Typographical Union #895. (Overhead I)
>
> As you can see from this letter, after January 1, 1986 your Union, Fort Lauderdale Typographical Union #895 ceased to exist and, as a consequence, no longer can represent Composing Room employees.

We have sent a letter to Wimberly (sic) Waters acknowledging his letter and telling him that since your Union no longer exists, we consider Composing Room employees to be independent employees. (Overhead II)

We also told Wimberly (sic) Waters, as you can see, that we are not going to accept an outside group from Miami to represent our Composing Room.

As far as I am concerned, the Composing Room should now be like any other independent department of our paper and should receive *wage and benefit improvements* like other independent departments. As you know, we have had similar situations for the Warehouse, Mailroom, Engravers, Machine Shop and Teamster drivers. *In each of these cases, when the department became independent, employees got new dental insurance, increased life insurance options, reduced health insurance and group life costs to employees, improved long term disability benefits, improved Christmas bonus, etc. – benefits that apply to all other independent employees.* (Of course those of you with job guarantees would still keep them.)

However, Jack tells me there are still legal quesitons that need to be sorted out and we have to wait until they are sorted out.

In the meantime, any questions you may have regarding independent employee benefits and policies, talk to Jack. We intend to operate the room as it has operated in the past. However, now your foreman and supervisor will deal directly with you.

We are in the middle of some exciting changes at our paper and I would like to share them with you. (Insert)

Hopefully, this will all be sorted out soon and I look forward to working with each of you. (Underlining added.)

Respondent has since refused to recognize and bargain with Local 430 as the collective bargaining representative of its employees.

At the hearing the General Counsel and Respondent entered into a stipulation of facts concerning the conduct of the election which stipulation consists of facts and conclusions contained in the Regional Director's original dismissal of the charges following an investigation and which was received over the objection of the Charging Party and is as follows:

> On December 11, 1985, unit employees, among others, voted to determine whether or not they wanted their collective bargaining representative, Typographical Union Local No. 895 to merge with Miami Typographical Union No. 430, AFL-CIO. Some of the eligible voters (including retirees) received mail ballots directly from the International Union Headquarters in Colorado and other employees voted personally in the December 11 election. The Charging Party maintains the employees, by a vote of 115 to 32, voted in favor of merger and thus it requested the Employer to bargain with Local 430. By letter dated January 27, 1985, the Employer refused the Union's request, stating it did not believe Local 430 legally represented the unit (composing room) employees. The investigation revealed several improprieties in the voting procedure, and although no employee made a specific complaint concerning the conduct of the election, some employees did testify with respect to those improprieties. For example, the eligibility list used by the Union reveals that 40 composing room employees were given ballots and 36 returned them and placed them in the ballot box. However, the tally of ballots for the composing room shows 41 for merger and 3 against. Further, by the union official's admission, there is no way of knowing if employees in the composing room who voted in person also received a mail ballot from the Union's Headquarters in Colorado, thereby creating the possibility of permitting one voter

to cast two ballots. One employee testified he was given a ballot by the union official holding the election and that he placed his ballot in the box, but according to the elegibility list he did not personally cast a ballot but rather he received a mail ballot from the International Union. Further, one employee stated that she chose not to vote, and therefore did not cast a ballot, but the eligibility list indicates that the employee was given a ballot and did vote. In addition, the ballot box with only a piece of tape over the opening was left in the Employer's maintenance room unattended from approximately 3:50 p.m. to 7 or 8 p.m. on the day the voting took place. Under these circumstances, it is concluded that irregularities in the voting procedure preclude conferral of representative status upon Local 430 on the basis of the December 11 election and that, therefore, the Employer did not violate the Act by refusing to recognize and bargain with the Charging Party.

A. Analysis

The complaint alleges that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 430, the exclusive collective bargaining representative of its employees engaged in composing room work following the merger of Local 430 and Local 895 effective 1 January 1986. Several issues concerning this allegation were litigated at the hearing as follows:

1. Whether the 11 December 1985 merger was subject to due process safeguards which had been previously imposed by the Board or whether the recent Supreme Court decision of *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 121 LRRM 2741 (1986), hereinafter referred to as *Seattle-First*, precludes the Board from conducting its due process inquiry into internal union matters such as mergers.

2. Whether the merger should be upheld in the event the Board has the authority to inquire into the due process requirements and in the event that the Board's due process standards are found not to have been met.

3. Whether there was substantial continuity of identity between pre-merger union, Local 895, and post-merger union, Local 430, sufficient to give rise to a continuing duty by Respondent to recognize and bargain with Local 430.

Respondent has also raised as a defense that Local 895 was defunct prior to the alleged merger with Local 430 and that there was therefore no union in existence to be merged with Local 430 and thus no continuity and no valid merger.

2. **The due process issue**

The General Counsel and Charging Party contend that the Board is precluded from inquiring into whether the merger election met due process safeguards as part of its traditional two-prong test to determine whether an Employer is required to bargain with a union following a merger but is now limited to the second part of the test (i.e., whether there was substantial "continuity" of identity between the pre and post-merger unions). Both the General Counsel and Charging Party contend that *Seattle-First* stands for the proposition that the Board has no authority under the Act to inquire into union affiliations and other "internal union matters" such as mergers but rather is limited to determining whether there was a lack of substantial continuity of identity between the pre and post-merger unions such as to give rise to a question of representation under the Act in order to invoke the Board's authority under the Act to hold elections and certify collective bargaining representatives. Respondent contends that *Seattle-First* is limited to its facts and holding that the Board may not relieve the employer of his bargaining liability on the basis of a lack of the due process finding because nonmembers were not allowed to vote in an affiliation election and that the Supreme Court expressly declined to address the question as to whether other due process requirements had been met by the affiliating unions in that case,

thus giving support to the argument that the Supreme Court recognized that other due process standards must be met in matters such as affiliations and particularly mergers which were not involved in that case. Respondent also cites a recent Board case *Fimco, Inc.*, 282 NLRB No. 93 (1987) in which the Board states that the Supreme Court "has recently held that the Act does not require that nonmembers be allowed to vote in affiliation elections. We, accordingly, reject the Respondent's contention as without merit. *The Respondent presents no other basis for contending that the Union did not provide adequate due process safeguards.*" (Underlining added.) From the underlined sentence, Respondent contends that the Board, itself, has given a more limited reading of *Seattle-First* and suggests that it will continue to consider alleged due process violations other than contentions concerning the voting rights of nonmembers.

In its recent supplemental decision on review in *Hammond Publishers, Inc.*, 286 NLRB No. 6 (1987) which involved an employer's challenge to an amendment of certification following an affiliation election on due process grounds and on a lack of continuity between a pre and post-affiliation bargaining representative, the Board applied its traditional two-prong test, concluded that the due process and continuity requirements had been met and found it unnecessaary to address the issue as to whether both parts of the test must be met in affiliation cases. The Board stated at pages 5 and 6, slip opinion:

> The Board has traditionally required that two conditions be met before it will grant a petition for the amendment of certification based on an affiliation or *merger*. First, the Board requires that the vote itself occur under circumstances satisfying minimum due process and, . . . continuity between the pre-and post-affiliation bargaining representative. (Underlining added.)

In the *Hammond* case at footnote 8, the Board also noted that the Supreme Court in *Seattle-First* "acknowledged the Board's traditional two-part test but did not have to reach the question of whether both continuity of representation and due process must be satisfied in all affiliation cases." In the *Hammond* case,

the Board likewise found it unnecessary to address this issue as it found that both the due process and continuity requirements had been satisfied. Under the facts of the instant case, I find that the due process and continuity of representation requirements have been met as hereinafter set out, and I thus find it unnecessary to address the issue of whether both continuity of representation and due process must be satisfied in a merger case.

With respect to whether the merger election satisfies minimum due process, Respondent has the burden of establishing an irregularity in the voting process as it is Respondent that is relying on the irregularity as justification for its refusal to bargain. *Insulfab Plastics, Inc.*, 274 NLRB 817 (1985). In the instant case, I find that Respondent has failed to establish that the procedures used in the vote were so irregular or so unmindful of due process as to invalidate the election. *Hammond Publishers, Inc.*, supra; *East Dayton Tool & Die Co.*, 190 NLRB 577 (1971). Thus, the evidence in this case established that both members and nonmembers were permitted to vote at the merger election, that notice of the merger vote was posted on the bulletin board in the composing room where all employees worked, that union meetings were held in November and December before the merger vote on 11 December 1985 at which the merger was discussed and that Local 895 Trustee Waters obtained permission of Respondent's representative, Vice President of Personnel, Spran, to conduct the vote on its premises. Ballots were mailed to members by the International and nonmembers were given ballots for voting in the composing room by Local 895's secretary-treasurer Sakowski. The vote was overwhelmingly in favor of merger. Although the ballot box for in person voting of nonmembers was left unattended, it was padlocked according to the testimony of Sakowski which I credit in this regard over that of composing room manager John McClusky who testified that he did not recall seeing a padlock. Respondent offered no evidence even suggesting that the ballot box or its contents had been tampered with. The only employee allegedly refused the right to vote was a supervisor, and he had not presented himself to vote but rather merely called out to Sakowski and inquired as Sakowski was leaving as to why he

had not been permitted to vote to which Sakowski replied, "because you are a supervisor."

I find that none of the alleged discrepancies affected the outcome of the election. It is clear that the overwhelming majority of members of Local 895 voted in favor of the merger by returning the mailed ballots in sealed envelopes which were counted separately according to the unrebutted testimony of Sakowski which I credit and which showed a total of 74 in favor of the merger and 29 opposed to the merger. Thus, even if all of the ballots cast in the composing room were not counted, there was an overwhelming majority in favor of the merger. Moreover, as discussed supra under *Seattle-First*, there was no requirement that nonmembers be permitted to vote to validate the merger election and the composing room balloting was for the purpose of allowing nonmembers who did not receive mailed ballots to vote. Assuming that one or more members may have voted in the composing room rather than utilize their mail ballot or even assuming arguendo, they voted in the composing room in addition to voting by mail, the election outcome would not have been affected thereby. Further, there was no evidence that any member did not receive his ballot or was otherwise deprived of the right to cast his ballot. There was no evidence presented that the mail balloting was tainted in any manner whatsoever. Further, with the possible exception of Norma Scheer, a nonmember who gave her ballot to Sakowski whom she stated she trusted completely, although she did not observe him place it in the ballot box, there was no evidence presented that the vote was not secret. I place no reliance or credit on the testimony of Personnel Vice President Spran who testified that he heard that the vote was not secret from McClusky and others. Furthermore, McClusky did not contend that the vote was not secret in his own testimony.

With respect to Respondent's contention that it has met its burden of proof sufficiently to shift the burden of proof to the General Counsel to prove that the vote occurred under circumstances satisfying minimum due process, I find that this contention is without merit. Initially, I do not find that the alleged discrepancies were so egregious as to shift the burden of proof.

In the recent *Hammond Publishers* case, the Board addressed an allegation that an unattended ballot box was sufficient to support a finding that an election did not meet due process and rejecting that contention, specifically noted, as in the instant case, that there was no evidence of any tampering with the ballot box. I similarly do not find the other alleged due process deficiencies such as the refusal to permit an admitted supervisor to vote or the handling of a single ballot of a single employee to cast doubt on the election process. Nor do I find that the alleged defunctness, discussed infra, of Local 895 casts doubt on Local 430's majority status. I thus do not find *Royal Coach Lines, Inc. v. NLRB*, ____ F.2d____ (2d Cir. 1988),[5] to be controlling under the facts of this case even assuming the Board adopts the rationale of that case with respect to the shifting of burden of proof from Respondent to the General Counsel.

The record also shows no evidence of any challenge by any employee to the conduct of the election. Respondent's attempt to inject a decertification petition filed by an employee in February 1986 was rejected. It is clear that at the time of Respondent's refusal to recognize and bargain with Local 430, there was no evidence of employee dissatisfaction with the merger election process. Furthermore, the decertification petition was filed following a speech by Respondent's president after Respondent's refusal to recognize and bargain with Local 430 and in which speech Respondent's president made implicit promises of improvements in the unit employees' wages and benefits once Respondent no longer had to deal with a union but could deal independently with the employees.

2. Respondent's defunctness defense

As part of its defense to its refusal to bargain, Respondent has alleged that Local 895 was defunct and thus there was no union for Local 430 to merge with. I find no merit to this defense as the evidence clearly shows that Local 895 and Respondent had an ongoing bargaining relationship for a period of over 30

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[5] Respondent brought this case to the attention of the undersigned by a post brief letter.

years entering into a series of successive collective bargaining agreements until they reached impasse in January 1985 and that they met again in April 1985 without success. Local 895's alleged lack of activity between April and 6 December 1985, when Waters (who had been appointed Trustee of Local 895 in October 1985) met with the Respondent did not establish that the Union was defunct. Former secretary-treasurer Sakowski testified that the current union leadership was tired and no new leadership could be found and that the local thus sought a trusteeship in order to eliminate the contract stalemate, better serve the members, and to facilitate a merger. Merger discussions were held between officials of Local 895 and Local 430 in October 1986 and approval was obtained from the International organization to commence preparing for and to conduct merger elections which were duly conducted. None of the foregoing establishes that the Union was defunct or unwilling or unable to represent its membership. Rather, the evidence discloses that the Union sought the trusteeship and the merger in order to bring fresh leadership to the Union and to eliminate the impasse in contractual negotiations and work for a new contract. Moreover, Respondent carries the burden of proof in the assertion of its defense and failed to present any evidence of the unwillingness or inability of Local 895 to serve its members such as to shift this burden of proof to the General Counsel or to otherwise prove its defense. *Yates Industries, Inc.*, 264 NLRB 1237, 1250 (1982); *Pioneer Inn Associates*, 228 NLRB 1263, 1264 (1977); *Hershey Chocolate Corporation*, 121 NLRB 901, 911 (1958); *Kent Corporation*, 272 NLRB 735 (1984).

3. The continuity issue

I find that the evidence establishes that Local 430 is the legitimate successor and collective bargaining representative of Local 895 as the result of the valid merger vote of Local 430 and Local 895 on 11 December 1985 and their subsequent merger effective on 1 January 1986.

I find that the evidence supports a finding of continuity between pre-merger Local 895 and post-merger Local 430. It is

undisputed that two members of Local 895's executive board were appointed members of the executive board of Local 430 upon the effective date of the merger and that less than a month later former Local 895's recording secretary Mel Field was appointed as recording secretary of Local 430 upon the resignation of the incumbent secretary. In addition, the chapel composed of Sun-Sentinel bargaining unit employees remained in existence and continued in its role to have responsibility for the processing of grievances and the administration of the labor agreement. I make this determination notwithstanding the lack of recognition accorded Local 430 by Respondent and the lack of a collective-bargaining agreement in existence. Moreover, the chapel continued to elect its own officers, collect its own dues, and maintain its own assets, savings, and checking accounts. In addition, the chapel continued to have responsibility for input into the collective bargaining process. Waters testified contract ratification votes, while a Local 430 matter, would routinely be voted on only by the employees of the particular employer with whom a contract is being negotiated. In addition, while the constitution and by-laws of pre-merger Local 430 became those of post-merger Local 430, they were substantially similar to those of pre-merger Local 895. The dues structure of Local 895 was also identical to that of post merger Local 430. Moreover, members of Local 895 were accorded the same rights and privileges of membership after the merger as they had before the merger.

In making its determination whether there has been substantial continuity between a pre-merger and post-merger union, the Board makes its determination on the "totality of a situation" rather than reliance on "the presence or absence of certain cited criteria." *Yates Industries, Inc.*, supra. I find that the totality of the circumstances in this case fully supports a finding of substantial continuity between pre-merger Local 895 and post-merger Local 430. I find that the General Counsel has shown that there was substantial continuity between Locals 895 and 430 following the merger. Conversely, I find Respondent has failed to demonstrate a lack of continuity between Local 895 and Local 430. *Insulfab Plastics, Inc.*, supra, at 821. See

also *Quemetco, Inc.*, 226 NLRB 1398 (1976) wherein the Board held the choice of representation by employees is of paramount importance over the continuity of representation.

Conclusions of Law

1. The Respondent, News/Sun-Sentinel Company, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO has been the exclusive representative for purposes of collective bargaining in the following described appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Respondent performing composing room work, excluding all office clerical employees, guards and supervisors as defined in the Act.

4. By its withdrawal of recognition from Local 430 and its refusal to bargain with Local 430, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

Having found tht Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act, including the posting of an appropriate notice. I shall recommend it be required to recognize and bargain collectively with Miami

Typographical Union No. 430 a/w International Typographical Union, AFL-CIO. In the absence of a showing of any special circumstances which would warrant the inclusion of a visitatorial clause, I decline the General Counsel's request to include one as part of the Remedy. *Cherokee Marine Terminal*, 287 N.RB No. 53 (1988).

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[6]

ORDER

The Respondent, News/Sun-Sentinel Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO as the exclusive bargaining unit representative of its composing room employees employed by Respondent at its Fort Lauderdale, Florida newspaper in Broward County Florida.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies and purposes of the Act:

(a) Recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO as the exclusive collective bargaining representative of the composing room employees employed by Respondent at its newspaper facility in Fort Lauderdale, Broward County, Florida.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its Fort Lauderdale, Florida newspaper facility copies of the attached notice marked "Appendix B."[7] Copies of the notice on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

Dated, Washington, D.C. 11 March 1988

/s/ Lawrence W. Cullen

Lawrence W. Cullen
Administrative Law Judge

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

"APPENDIX A"

GENERAL COUNSEL'S MOTION TO CORRECT THE RECORD

The General Counsel respectfully requests that the Honorable Administrative Law Judge correct the record as follows:

1. Page I-23, line 17: "pre-imposed merger unions." should read "pre-and-post merger unions."

2. Page I-23, line 22: "NLRB versus financial institution . . ." should read "*N.L.R.B. v. Financial Institution Employees (Seattle-First National Bank)*"

3. Page I-24, line 3, "condition official in" should read "condition to granting"

4. Page I-24, line 19: "union procedures of its members." should read "union procedures vis-a-vis its members."

5. Page I-24, line 23: "in the certification procedure . . ." should read "decertification procedures"

6. Page I-25, line 2: "dramatic to detail" should read "dramatic to change"

7. Page I-25, line 7: "the quote . . ." should read "the court . . ."

8. Page I-25, line 14: "due process issue based of this union members, . . ." should read "due process issue vis-a-vis union members, . . ."

9. Page I-25, line 19: "whereas . . ." should read "where, as . . ."

10. Page I-25, line 21: "pre-imposed merger unions . . ." should read "pre-and-post merger unions . . ."

11. Page I-25, line 22: "And where the Employer has now injected evidence demonstrating that the union has lost its majority standing. The presumption . . ." should read "And where the Employer has no objective evidence demonstrating that the Union has lost majority standing, the presumption . . ."

12. Page I-26, line 9: "decision" should read "position"

13. Page I-26, line 11: "the case of jurisdiction" should read "in the present case"

14. Page I-26, line 15: "the lack of the records with safeguards had no material effect . . ." should read "that had no material effect . . ."

15. Page I-27, line 4: "885" should read "8(a)(5)"

16. Page I-27, line 24: "Analon B (ph) versus Fair . . ." should read "*N.L.R.B. v. Financial Institution Employees* . . ."

17. Page I-56, line 22: "The chapel continues to assist." should read "The chapel continues to exist."

18. Page I-71, line 4: "committee and negotiations . . ." should read "committee in negotiations . . ."

19. Page I-83, line 18: "Local 830" should read "Local 430"

20. Page II-45. lines 12 and 15: "Langan Griffin matter" should read "Landrum-Griffin matter"

21. Page II-101: page "I-101" should read "II-101"

22. Page II-102, line 25: "A" for answer should read "Q" for question

23. Page II-158, line 20: Stated as question "Q" should be continuation of Answer.

24. Page II-170, line 2: "They were all in sealed envelopes?" should read "They were all in sealed envelopes."

"APPENDIX B"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all parties participated, the National Labor Relations Board has found that we have violated the National Labor Relations Act. We have been ordered to post this notice and to abide by its terms.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize and bargain collectively with Miami Typographical Union No. 430 a/w International Typographical Union, AFL-CIO as the exclusive collective bargaining representative of the composing room employees at our Fort Lauderdale, Florida newspaper facility, exclusive of office clerical employees, professional employees, and supervisors as defined in the Act.

NEWS/SUN-SENTINEL COMPANY
(Employer)

Dated: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, P.O. Box 172068, 700 Twiggs Street, Suite 511, Tampa, Florida 33672-0068. Telephone: (813) 228-2662.

NOT INCLUDED
IN BOUND VOLUMES

Ft. Lauderdale, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWS/SUN-SENTINEL COMPANY

and

Case 12–CA–11916

MIAMI TYPOGRAPHICAL UNION
NO. 430 a/w INTERNATIONAL
TYPOGRAPHICAL UNION, AFL–CIO

ORDER DENYING MOTION

On September 21, 1988, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] On October 12, 1988, News/Sun-Sentinel Company, the Respondent, filed a motion for reconsideration or to remand to the administrative law judge for further proceedings. On October 20 and 25, 1988, the Charging Party and General Counsel, respectively, filed oppositions to the Respondent's motion.

The Board having considered the matter,

IT IS ORDERED that the motion for reconsideration or to remand to the administrative law judge for futher proceedings

[1] 290 NLRB No. 156.

is denied as it raises nothing not previously considered and lacks merit.[2]

Dated, Washington, D.C. November 17, 1988.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

[2] The decertification petition, which was filed after the Respondent violated Sec. 8(a)(5), is of no relevance to the merger. Further, the Supreme Court has long recognized that an employer's unlawful refusal to bargain "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944). Under the circumstances, the decertification petition cannot be regarded as an accurate barometer of employee sentiment and cannot serve as a basis for an election.

United States Court of Appeals

FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

No. 88-1815 **September Term, 1989**

News/Sun Sentinel Company,

Petitioner

v.

National Labor Relations Board,

Respondent

Miami Typographical Union, No. 430,

Intervenor

Before: Wald, Chief Judge, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED , by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards did not participate in this matter.

NATIONAL LABOR RELATIONS ACT
29 U.S.C. §§ 151-169

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Supreme Court, U.S.
FILED
MAY 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1641

In the Supreme Court of the United States

OCTOBER TERM, 1989

NEWS/SUN SENTINEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that the conduct of the union merger election satisfied minimum standards of due process and thus accurately reflected the employees' true desires.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 890 F.2d 430. The decision and order of the National Labor Relations Board (Pet. App. 10a-14a), including the decision of the administrative law judge (Pet. App. 15a-33a), is reported at 290 N.L.R.B. No. 156. The Board's order denying petitioner's motion for reconsideration (Pet. App. 39a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on November 17, 1989. A petition for rehearing was denied on January 16, 1990. App., *infra*, 1a.[1] The petition

[1] The order denying the petition for rehearing is not included in the petition appendix, but is reprinted in an appendix to this brief.

for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For some 30 years prior to 1985, petitioner had recognized the Fort Lauderdale Typographical Union Local No. 895 (Local 895) as the representative of its composing room employees. The most recent collective bargaining agreement between petitioner and Local 895 expired in June 1984. No agreement was reached on a new contract, and petitioner implemented its final offer in March 1985.[2] The parties met again in April without reaching agreement. In October, at Local 895's request, it was placed under trusteeship by its parent organization, the International Typographical Union (ITU).[3] The ITU then authorized a merger between Local 895 and Local 430, and a merger election was scheduled for December 11. Pet. App. 17a-18a.

The ITU sent mail ballots to members of Local 895, and the merger was discussed at membership meetings in November and early December. The mail ballots, which were returned in sealed envelopes and separately counted, yielded a tally of 74 in favor of the merger and 29 opposed. Pet. App. 18a, 27a.

In addition, the ITU-appointed trustee received permission from petitioner to conduct a merger vote in the composing room among nonunion members in the bargaining

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[2] Further references are to 1985 unless otherwise indicated.

[3] Local 895 sought the trusteeship because of "burn out" among its current officers and its inability to recruit new officers from within. The current officers felt that a trusteeship might lead to a resumption of negotiations with petitioner and would facilitate a merger between Local 895 and another ITU local, Miami Typographical Union No. 430 (Local 430), a step that the locals had been discussing for some time. Pet. App. 17a-18a.

unit, and a notice of the merger vote was posted in the composing room. Pet. App. 18a-19a. On the day of the election, nonunion members were given ballots and permitted to vote by placing a ballot in the opening of a padlocked ballot box. Local 895 Secretary-Treasurer Sakowski kept the padlocked box by his work station during the first work shift. It was left unattended in petitioner's maintenance room with a tape over the opening for three to four hours during the second shift. *Id.* at 19a, 23a. The eligibility list used by Local 895 for the composing room voting showed that 40 employees were given ballots in the composing room and that 36 of them had placed their ballots in the ballot box.[4] The tally of ballots for the composing room totaled 44 ballots, 41 for merger and 3 against. *Id.* at 22a. The total tally of the Local 895 vote was 115 for merger and 32 against. *Id.* at 19a.

On December 17, the trustee of Local 895 informed petitioner that the bargaining unit employees had voted 115 to 32 in favor of merging with Local 430 and that the merger would be effective on January 1, 1986. He requested a meeting to negotiate a new agreement. Pet. App. 19a, 29a. On January 27, 1986, petitioner responded that it understood that Local 895 "no longer exists and will no longer represent" its composing room employees, and that it did not believe that Local 430 "legally represents" those employees. It refused to recognize and bargain with Local 430 as their representative. *Id.* at 19a-20a.

2. The Board affirmed the findings and conclusions of the ALJ. The Board held that petitioner's refusal to bargain with the merged union violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and it ordered petitioner to recognize and bargain with

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[4] Sakowski also gave ballots to union members who assured him that they had not received mail ballots, and he deposited his own mail ballot in the ballot box. C.A. App. 316, 319.

Local 430. Pet. App. 12a, 31a-33a. The Board applied its traditional two-pronged test to determine whether petitioner was obligated to recognize and bargain with the merged union—*i.e.*, whether the merger vote occurred under "circumstances satisfying minimum due process"[5] and whether there was substantial continuity between the pre- and post-merger union. The Board found that both conditions were satisfied here. *Id.* at 24a-31a.

Initially, the Board observed that petitioner bore the burden of proving an "irregularity in the voting process as it is [petitioner] that is relying on the irregularity as justification for its refusal to bargain." Pet. App. 26a, citing *Insulfab Plastics, Inc.*, 274 N.L.R.B. 817 (1985). The Board found that petitioner had failed to show that the procedures used in the vote "were so irregular or so unmindful of due process as to invalidate the election." Pet. App. 26a. Thus, the Board found no evidence of irregularities in the mail vote conducted among union members, which had produced an overwhelming vote in favor of the merger.[6] It also found that, with the possible exception of one nonmember who gave her ballot to union official Sakowski for deposit in the ballot box, there was no evidence that the composing room balloting was not secret. *Id.* at 27a.[7] The Board

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[5] This includes notice of the election to all voters, an opportunity for voters to discuss the election, and reasonable precautions to maintain ballot secrecy. See *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 (1974), enforced, 515 F.2d 334 (5th Cir. 1975).

[6] The Board found no evidence that any member did not receive his ballot or was otherwise deprived of his right to vote, or that the mail balloting, which had been separately tallied, "was tainted in any manner whatsoever." Pet. App. 27a. It added that, assuming that some members had deposited their mail ballots in the ballot box, or even that some members had voted in the composing room in addition to voting by mail, the election outcome would not have been affected. *Ibid.*

[7] The Board rejected petitioner's contention that evidence that the ballot box was unattended was sufficient proof of a lack of due

added that, even if all the composing room ballots were not counted, the result would be the same. *Ibid.* It also noted that there was no evidence of any employee challenge to the conduct of the election or dissatisfaction with the election process. *Id.* at 28a.[8]

Finally, the Board found that there was substantial continuity between the pre-merger Local 895 and the post-merger Local 430. The changes resulting from the merger, the Board concluded, were not "*sufficiently dramatic* to alter the union's identity." Pet. App. 11a n.1, citing *May Dep't Stores Co.*, 289 N.L.R.B. No. 88 (June 30, 1988), slip op. 14, and *NLRB* v. *Financial Institution Employees, Local No. 1182* (*Seattle-First*), 475 U.S. 192, 206 (1986).[9]

3. The court of appeals upheld the Board's findings and conclusions, and enforced its order. The court held that the Board was justified in finding on the record evidence that there was sufficient continuity between the pre- and post-merger union. Pet. App. 5a.[10] It also found that the

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process where, as here, there was no evidence the box had been tampered with. Pet. App. 28a, citing *Hammond Publishers, Inc.*, 286 N.L.R.B. No. 6 (Sept. 30, 1987).

[8] The Board found that an employee decertification petition, filed in February 1986, after petitioner had refused to bargain with Local 430, had no relevance to the merger. Pet. App. 28a, 40a n.2. Citing *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704 (1944), the Board declined to permit the decertification petition filed after petitioner's unlawful refusal to bargain to serve as a "barometer of employee sentiment * * * [or] as a basis for an election." Pet. App. 40a n.2.

[9] The Board found that some of the officers of Local 895 became officers of the merged union, and that the authority of the chapel, consisting only of petitioner's composing room employees, remained substantially unaltered with respect to collective bargaining and contract administration. Pet. App. 11a n.1.

[10] Petitioner does not challenge that finding in this Court.

record did not support petitioner's contention that procedural irregularities in the election violated minimum standards of due process. *Ibid.*

The court agreed with the Board that an employer challenging a merger election must make an evidentiary showing of irregularity before the burden shifts to the General Counsel to make an affirmative showing of regularity, and that there was no evidence to suggest any taint in the mail balloting.[11] It found that "[a]bsent any evidence of irregularity," the mail vote "is a reliable indicator of majority sentiment." Pet. App. 5a-6a. The court also found that petitioner had presented insufficient evidence of irregularity to disturb the composing room results. It rejected petitioner's contention that the composing room procedures failed to insure that employees who voted in person did not also vote by mail, finding that the few discrepancies shown by the evidence were insufficient to undermine the vote in favor of merger. It agreed with the Board that requirements as to the custody of the ballot box in Board-conducted elections do not apply to a union merger election, and found that the composing room procedures "were not so lacking in safeguards as to cast substantial doubt on the election outcome." *Id.* at 6a.

ARGUMENT

The court of appeals' decision is correct, and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

This Court held in *Seattle-First* that the Board had exceeded its authority by imposing, atop its traditional

[11] The court observed that, while the mail balloting did not conform to the Board's standards for its own elections, those standards do not govern union conducted elections. Pet. App. 6a.

minimum due process requirements, the requirement that nonmembers be allowed to participate in an affiliation or merger vote. 475 U.S. at 201-209.[12] Although the Court noted that "the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations," the Court nonetheless concluded that it "need not assess the propriety of the Board's past [due process] procedures." *Id.* at 199 n.6. This case also provides no occasion for the Court to consider that question, since petitioner does not contest the propriety of the Board's due process requirements. Instead, petitioner only contends, Pet. i, 7, that the Board erred in finding that those requirements were satisfied in this case. That essentially fact-bound issue does not warrant review by this Court.

In any event, the court below correctly upheld the Board's findings that the election was fairly conducted. In concluding that the merger vote procedures did not fall below its standards, the Board considered the record evidence in light of its long-standing rules that an employer who challenges a merger vote must make an affirmative showing of material irregularity and that union reorganization votes need not conform to the standards adhered to in Board conducted elections.[13] The Board found, and the court of appeals agreed, that there was no evidence that the mail balloting by union members was tainted, and under this Court's decision in *Seattle-First*, Local 430 was not required to give nonmembers an opportunity to vote on the merger.

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[12] Although Seattle-First involved an independent local union's affiliation with an international organization, the same standards apply to other union organizational restructuring, such as merger. *Hydrotherm, Inc.*, 280 N.L.R.B. 1425, 1428 (1986). See also *May Dep't Stores Co.*, 289 N.L.R.B. No. 88 (June 30, 1988), slip op. 2 n.4.

[13] Both of these rules have been approved by the courts. See, *e.g.*, *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 965-968 (1st Cir. 1986), enforcing 274 N.L.R.B. 817, 821-823 (1985); *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 856 n.4 (5th Cir.), cert. denied, 439 U.S. 839 (1978).

In any event, the Board found, and the court of appeals agreed, that any duplicative voting in the composing room had been minimal, and that the ballot box discrepancy was insignificant. Those findings do not warrant further review.[14]

CONCLUSION

The petition for a writ of a certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
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LINDA SHER
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Attorney

MAY 1990

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[14] The Board's decision in each case turns on an examination of all the circumstances. Petitioner is mistaken in its contention, Pet. 6-7, that the decision here is inconsistent with Board precedents. In *J. H. Day Co.*, 204 N.L.R.B. 863 (1973), 56 out of 134 ballots were defective and the proposed affiliation had passed by only 17 votes. By contrast, here the outcome would be the same if none of the composing room votes were counted.

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1815

NEWS/SUN SENTINEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
MIAMI TYPOGRAPHICAL UNION, NO. 430, INTERVENOR

[Filed Jan. 16, 1990]

BEFORE: Wald, Chief Judge; Ruth B. Ginsburg and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Petitioner's Petition for Rehearing, filed December 26, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
DEPUTY CLERK

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